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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 794

FRED W. BURDETTE, SR.,
Petitioner

v.

STATE OF TENNESSEE,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Fred W. Burdette, Sr. prays that this Court grant rehearing of its order of March 23, 1970, denying his petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee in the above-entitled cause as prayed for in his petition filed November 1, 1969.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

This Court's decisions in *McCarthy v. United States*, 394 U.S. 459 (1969) and *Boykin v. Alabama*, 395 U.S. 238 (1969) construing generally the procedures required to protect criminal defendants who enter guilty pleas, have stimulated several lower court judges to discuss the particular procedures necessary to protect those defendants who plead guilty pursuant to an agreement or "plea bargain" with the prosecution. Opinions of Justice Peters of the California Supreme Court[1] and Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit[2] were quoted from on pages 8 and 9 of petitioner's "Reply to Brief in Opposition" filed in this Court on March 16, 1970 and will not be repeated herein.

However, subsequent to the filing of petitioner's reply, the American Bar Association's Project on Standards for Criminal Justice published its *Standards Relating to the Prosecution Function and the Defense Function*. In this latest document in a series of publications on standards relating to criminal justice, the project attempts once again to wrestle with the problems surrounding the acceptance of guilty pleas entered pursuant to a bargain with the prosecution. In its earlier publication dealing with the *Standards Relating to Pleas of Guilty*, the project stated as follows on pages 63-64:

> "Current bargaining practices have not often been the subject of appellate review and consequently the important issues have not received adequate attention from appellate courts. Language in the reported cases asserting that pleas obtained in exchange for promises are not voluntary is not uncommon, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962).

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[1] *In re Tahl*, 460 P.2d 499 (1969), concurring opinion.

[2] *Scott v. United States*, 419 F.2d 264 (1969) and *Prettyjohn v. United States*, U.S. App. D.C. No. 21666, November 17, 1969, dissenting opinion.

> These cases however, 'have stated the rule in dicta or in holdings that did not extend to situations in which the promises were in fact fulfilled', Note 36 Texas L.Rev. 97, 97 (1957)".

Not since *Shelton v. United States*, 356 U.S. 26 (1958), has this Court accepted a case for the purpose of deciding a question concerning the practice of plea bargaining. In *Shelton*, the confession of error by the Solicitor General and the subsequent reversal of the Fifth Circuit's decision in a memorandum decision without opinion only added to the confusion already surrounding plea bargaining.

In the resulting vacuum it is not surprising, in view of the fact that "something on the order of 90 per cent"[3] of criminal trials are disposed of by pleas of guilty, that there have been attempts to justify the process of plea bargaining and to devise standards to regulate it. Citing its own study on *Pleas of Guilty*, the ABA's Project on Standards for Criminal Justice, has stated that "The propriety of plea discussions and plea agreements now has been given explicit recognition".[4] The rationale for this favorable recognition is explained in the following statement:

> "[A] plea agreement may serve the public interest because it increases the promptness and certainty of the application of correctional measures, because by his plea the defendant acknowledges his guilt and, hopefully, shows a willingness to accept responsibility for his conduct, because the plea may permit a more appropriate sanction, because the plea obviates the need for a costly and time-consuming trial, and, in some cases, because the defendant has cooperated in the prosecution of other offenders. (Id. at 243-244).

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[3] *ABA Standards, The Defense Function*, 244.

[4] *Id.* at 243.

All of the above may be true, but it is also true that bargaining between a man facing the possibility of a long jail sentence and a prosecutor can be unequal and even coercive in many instances. As the original panel of Fifth Circuit Judges in *Shelton* stated, "Justice and liberty are not the subject of bargaining and barter".[5] In the instant case where a father's concern for his son's welfare was obviously present, justice demands greater inquiry than the perfunctory questioning carried out by the trial judge. (See Petition, pp. 5-7.)

The propriety of the prosecution offering to Petitioner and proposing to the court a potentially coercive plea in return for lenient treatment of petitioner's son has been a central issue throughout the litigation of this matter in the lower courts. Thus, in Petitioner's "Motion for a New Trial" filed with the trial court on March 14, 1968, Petitioner alleged that he had "entered a plea of guilty in order to obtain a smaller sentence for his son, notwithstanding the fact that he was not guilty of any intentional wrongdoing". (See Petition, pp. 6-9.) These allegations were repeated in every pleading addressed to the merits of Petitioner's case filed in the Tennessee courts. Thus, the question concerning the propriety of the prosecution's role in the bargain leading to Petitioner's plea of guilty was adequately raised below.

The instant case presents the Court with a record on which important questions too long left undecided may be considered. That these questions are increasingly important is demonstrated by the careful study the ABA's Project on Standards for Criminal Justice has given the matter, and that organization's sanctioning of a policy which, in light of this Court's action in *Shelton, supra,* is at least questionable in many of its applications. For this reason, the Court's order of March 23, 1970 should be reconsidered and the Petition for Writ of Certiorari granted.

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[5] *Shelton v. United States,* 242 F.2d 101, 113, rev'd 246 F.2d 571 (1957).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Rehearing of Order Denying Petition for Writ of Certiorari should be granted and a writ of certiorari to the Supreme Court of Tennessee should be issued.

Respectfully submitted,

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April 13, 1970